BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MAX L. DAVIS	)	
Claimant	)	
	)	
V.	)	
	)	
SEABOARD FARMS, INC.	)	
Respondent	)	Docket No. 1,075,400
	)	
AND	)	
	)	
AMERICAN ZURICH INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the December 7, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller. Aaron L. Kite of Dodge City, Kansas, appeared for claimant. John D. Jurcyk of Kansas City, Kansas, appeared for respondent.

The ALJ ordered claimant to attend the next medical evaluation scheduled by respondent. The ALJ further ordered respondent to authorize surgery as recommended by Dr. Shah, claimant's treating physician.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the December 7, 2015, Preliminary Hearing, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues the ALJ exceeded her jurisdiction in ordering it to authorize surgery after finding claimant failed to attend an independent medical evaluation pursuant to K.S.A. 44-515.

Claimant contends the Board lacks jurisdiction to review respondent's appeal. Claimant argues respondent did not suggest at the hearing that it was improper for the ALJ to order treatment, and issues not raised before the ALJ cannot be raised for the first time on appeal. Alternatively, claimant argues the ALJ's Order should be affirmed. Claimant states he has attended the proposed examination since the date of the hearing.

The issues for the Board's review are:

1. Does the Board have jurisdiction to review respondent's appeal?

2. If so, did the ALJ exceed her authority in ordering respondent to authorize claimant's surgery?

FINDINGS OF FACT

Claimant suffered a work-related accident on May 26, 2015, resulting in broken floating ribs. Claimant's authorized treating physician, Dr. Shah, recommended surgery. Respondent did not authorize surgery, but instead requested claimant be evaluated by a thoracic surgeon to determine whether the surgery was reasonable and necessary. Respondent scheduled this evaluation on two separate occasions: October 29, 2015, and November 9, 2015. Claimant failed to appear. Respondent filed a Motion to Suspend Benefits with the Division on December 4, 2015.

At the preliminary hearing, respondent requested claimant be required to appear for the evaluation.

The ALJ replied:

> Well, it has always been my position that if an authorized treating physician, which the respondent picked, recommended surgery that the respondent can't just deny the surgery and go out and try to get another opinion in hopes that no surgery would be authorized. So the respondent will be required to authorize the surgery as recommended by the authorized treating physician Dr. Shah.
>
> The other side to this is that the respondent has every right to send the claimant out for periodic evaluations and the respondent – or the claimant is ordered to attend an evaluation if it's scheduled again by the respondent. Failure to do so could result in his treatment being terminated and put on hold until he does, in fact, attend that evaluation.[1]

The ALJ issued an Order on December 7, 2015. Respondent timely appealed.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-534a(a)(2) states, in part:

> Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative

[1] P.H. Trans. at 4-5.

law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2014 Supp. 44-551(l)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

K.S.A. 2014 Supp. 44-515(a) states, in part:

After an employee sustains an injury, the employee shall, upon request of the employer, submit to an examination at any reasonable time and place by any one or more reputable health care providers, selected by the employer, and shall so submit to an examination thereafter at intervals during the pendency of such employee's claim for compensation, upon the request of the employer, but the employee shall not be required to submit to an examination oftener than twice in any one month, unless required to do so in accordance with such orders as may be made by the director. All benefits shall be suspended to an employee who refuses to submit to such examination or examinations until such time as the employee complies with the employer's request. The suspension of benefits shall occur even if the employer is under preliminary order to provide such benefits.

K.S.A. 2014 Supp. 44-518 states:

If the employee refuses to submit to an examination upon request of the employer as provided for in K.S.A. 44-515 and amendments thereto or if the employee or the employee's health care provider unnecessarily obstructs or prevents such examination by the health care provider of the employer, the employee's right to payment of compensation shall be suspended until the employee submits to an examination and until such examination is completed. No compensation shall be payable under the workers compensation act during the period of suspension. If the

> employee refuses to submit to an examination while any proceedings are pending for the purpose of determining the amount of compensation due, such proceedings shall be dismissed upon showing being made of the refusal of the employee to submit to an examination.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[2]

ANALYSIS

There are two separate orders contained in the ALJ's Order of December 7, 2015. The first is an order for medical treatment, made under the authority of K.S.A. 2014 Supp. 44-534a. K.S.A. 2014 Supp. 44-534a(a)(2) grants a judge jurisdiction to decide issues concerning payment of medical compensation.

The issues over which the Board has jurisdiction in an appeal made pursuant to K.S.A. 2014 Supp. 44-534a(a)(2) are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.[3] None of the listed issues are raised in relation to the ALJ's order for medical treatment. As such, the Board does not have jurisdiction to review this issue.

The second issue is the ALJ's effective denial of respondent's Motion to Suspend Benefits pursuant to K.S.A. 2014 Supp. 44-515. In *Bui v. Monfort,*[4] the Board declined to review an ALJ's order to not suspend benefits pursuant to K.S.A. 44-518. In *Bui,* the Board found that an order on a respondent's motion to suspend benefits pursuant to K.S.A. 44-518 was interlocutory.[5] The Board does not have jurisdiction to review interlocutory appeals.[6]

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[2] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[3] See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[4] *Bui v. Monfort*, No. 184,517, 1996 WL 96671 (Kan. WCAB Feb. 23, 1996).

[5] *Id.* at 1. K.S.A. 44-518 was the only remedy for refusal to attend a medical examination scheduled pursuant to K.S.A. 44-515. The suspension remedy contained in K.S.A. 44-518 was not added to K.S.A. 44-515 until 2011.

[6] *Walker v. State of Kansas*, No. 1,048,030, 2013 WL 485696 (Kan. WCAB Jan. 25, 2013); *Stupasky v. Hallmark Marketing Corp.*, No. 1,031,988, 2012 WL 1142954 (Kan. WCAB Mar. 14, 2012); *Pham v. Dold Foods, Inc.,* Nos. 1,013,951 & 1,013,952, 2011 WL 6122903 (Kan. WCAB Nov. 22, 2011).

If the Board had jurisdiction, the Kansas Supreme Court in *Neal v. Hy-Vee, Inc.*[7] provides some guidance on the purpose of and burden required by K.S.A. 44-515 and K.S.A. 44-518, writing:

> K.S.A. 44-518 is designed to preserve the employer's right to discovery through examination by a doctor of the employer's choice. The examination provided for in 44-515 is the discovery tool for the benefit of the employer. It provides the employer an opportunity to seek independent medical opinions of an employee's condition during the pendency of the employee's claim for benefits. The statute does not provide that the employer has an absolute right to an examination at the time and place of its choosing; rather, the examination must be at a reasonable time and place. In protecting the employer's right to this discovery, K.S.A. 44-518 provides that if the employee refuses, obstructs, and prevents the employer from exercising its option for examination under 44-515, the employee's right to payment of compensation shall be suspended until the employee submits to an examination and such examination is completed.
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> The very nature of the language used in 44-518 suggests that before suspension of benefits, there must be an affirmative act on the part of the employee to frustrate the employer's discovery or examination. In our interpretation of 44-518, we follow a familiar maxim of statutory construction which provides: "Ordinary words are to be given their ordinary meaning, and a statute should not be so read as to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it. [Citation omitted.]" *GT, Kansas, L.L.C. v. Riley County Register of Deeds*, 271 Kan. 311, 316, 22 P.3d 600 (2001).
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> Black's Law Dictionary defines "refusal" as "[t]he act of one who has, by law, a right and power of having or doing something of advantage, and decline it." Black's also indicates that the declination of a request or demand, or the omission to comply with some requirement of law, be "*as the result of a positive intention to disobey*." (Emphasis added.) Refusal is often coupled with "neglect," but Black's notes that neglect signifies a mere omission of a duty "*while 'refusal' implies the positive denial of an application or command, or at least a mental determination not to comply*." (Emphasis added.) Black's Law Dictionary 1282 (6th ed.1990).
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> "Obstruct" is defined as "[t]o hinder or prevent from progress, check, stop, also to retard the progress of, make accomplishment of a difficult and slow. . . . To impede." Black's Law Dictionary 1077 (6th ed.1990).
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> The ordinary meaning of the words used in K.S.A. 44–518 contemplate a positive intention to disobey and to hinder. We believe K.S.A. 44–518 contemplates circumstances where an employee makes a deliberate decision not to attend the examination or to obstruct or prevent the employer from gathering its own independent evaluation of his medical condition. Thus, the Board's interpretation

[7] *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 15, 81 P.3d 425, 436 (2003).

> that there must be an element of willfulness or intent is consistent with the ordinary meaning of the words of K.S.A. 44-518.[8]

The hearing record giving rise to this appeal was cursory. Argument was made, but no testimony was taken and no evidence was admitted. As such, it is impossible to discern the intent aspect of claimant's failure to attend the scheduled medical appointments. Simply alleging claimant refused to attend, without supporting evidence, is not sufficient to meet the burden required by *Neal.*

CONCLUSION

The Board does not have jurisdiction to review the ALJ's Order related to medical treatment. The Board lacks jurisdiction to review the ALJ's Order denying respondent's Motion to Suspend Benefits as it is interlocutory in nature.

ORDER

WHEREFORE, respondent's appeal of Administrative Law Judge Pamela J. Fuller's Order dated December 7, 2015, is dismissed.

IT IS SO ORDERED.

Dated this _____ day of February, 2016.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

[8] *Neal, supra,* at 14-15.

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Hon. Pamela J. Fuller, Administrative Law Judge